SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964

NO. 509

EVVA GERTRUDE KING, *Administratrix of the Estate of Anderson J. King, Deceased,*
Defendant-Petitioner,

vs.

BLANCHE J. SIMMONS, *Administratrix of the Estate of Croner G. Simmons, Deceased,*
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The defendant-petitioner above named, respectfully petitions this Honorable Court for a Writ of Certiorari to review an opinion of the Court of Appeals for the Fourth Circuit rendered in this cause on June 10, 1964, and in connection therewith respectfully shows the following:

CITATIONS TO OPINIONS BELOW

The opinion below involving this cause is reported in 333 F. 2d 178 (4th Cir., 1964) (Appendix, page 1A); the Findings of Fact and Conclusions of Law of Judge Bell, in the United States District Court for the Eastern District of North Carolina, filed October 22, 1963, and Judgment filed on October 29, 1963, pursuant thereto, were not reported but appear in the Record filed herein. (Transcript of Record, page 1, Index to Appendix, page 67).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), which grants this Court power to review the decisions of the Courts of Appeals by Writ of Certiorari upon petition of any party to any civil case after rendition of judgment.

It is also shown as follows:

(1) The Opinion below was filed and entered on June 10, 1964.

(2) A Petition for Rehearing was filed by Petition herein on July 8, 1964, and Order denying said Petition was filed on July 16, 1964.

QUESTIONS PRESENTED

1. May a Party Defendant be Substituted Under Former Rule 25(a), Federal Rules of Civil Procedure more than two years after the death of the original party defendant?

2. May a person be made a party in a representative capacity and may a judgment be entered against a party in a representative capacity when the record and evidence clearly reveals that such person did not in fact then hold or have such representative capacity?

3. May there be a waiver of the requirement of state law that an action against a deceased person's estate must be prosecuted against a duly appointed and acting personal representative and if so, was there any waiver in this case?

4. Did the District Court have jurisdiction over the person of Evva Gertrude King?

FEDERAL RULES OF CIVIL PROCEDURE 25(a) and 6(b) (PRIOR TO 1963 AMENDMENT and 17(b)

"Rule 25. Substitution of Parties. (a) Death. (1) If a party dies and the claim is not thereby extinguished,

the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district." Rule prior to amendment effective July 1, 1963.

"Rule 17. *Parties Plaintiff and Defendant; Capacity* (b) *Capacity to Sue or Be Sued.* The capacity of an individual other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of endorsing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sec. 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

"Rule 6. *Time* (b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion

or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, effective March 19, 1948." (Rule prior to amendment effective July 1, 1963.)

STATEMENT OF THE CASE

This is an action for alleged wrongful death arising out of a collision between a delivery truck driven by one Croner G. Simmons, who was killed in the collision, and a tractor trailer driven by one Anderson J. King, now deceased, who was a resident of Florida at the time suit was instituted. The collision occurred on November 15, 1958, on U. S. Highway 301, near Benson, North Carolina. This action was originally instituted in the Superior Court of Wake County, North Carolina on December 4, 1959, and service was had on Anderson J. King, the Florida resident, under the North Carolina non-resident motorists act. In apt time the case was removed to the United States District Court for the Eastern District of North Carolina, jurisdiction in the District Court being pursuant to Title 28, U.S.C., Sec. 1441 and Title 28. U.S.C., Sec. 1332, (Diversity of Citizenship concerning a controversy exceeding the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.) The defendant denied negligence and alleged contributory negligence and filed a counterclaim.

After the action was instituted, the defendant Anderson J. King died in the State of New York, while still a resident of the State of Florida. His widow, Evva Gertrude King,

was appointed Administratrix of his estate by the Judge of the County Court of Indian River County, Florida, and after administering the estate, she filed her final returns and her petition for final discharge. The order or letters of final discharge as Administratrix was entered by the Judge of said Florida Court on April 20, 1962. The plaintiff has never moved to have her reappointed or the estate reopened.

From the date of defendant's death, only the following events transpired in the case during the two years following defendant's death:

September 11, 1960 - Defendant Anderson J. King died, (his death was not known by his attorneys until October 3, 1962.)

December 29, 1960 - Defendant Anderson J. King's attorneys gave notice of the taking of the deposition of witness Linn.

January 11, 1961 - Deposition of witness Linn taken.

December 19, 1961 - Defendant Anderson J. King's attorneys served interrogatories upon plaintiff.

December 28, 1961 - Plaintiff answered interrogatories.

April 20, 1962 - Mrs. Evva G. King was discharged as Administratrix of the Estate of Anderson J. King by the Judge of the County (Probate) Court for Indian River County, Florida. (Transcript of Record, Page 1; Page 24, Appendix)

August 23, 1962 - District Court entered an order setting a pre-trial conference.

September 11, 1962 - This date marks the expiration of the period of two years following the death of the defendant.

Thereafter, following the two year period the following events transpired.

September 18, 1962 - Pre-trial conference held by order of Court and discovery time extended. (The August 23, 1962 pre-trial order had set the time limit for discovery as of September 18, 1962, the date of the pre-trial conference. The plaintiff did not conduct any discovery proceedings during this time, and, as a matter of fact, had not, since the suit was instituted on December 4, 1959, a period of almost three years, conducted any discovery.)

September 21, 1962 - Plaintiff served Interrogatories on King's attorney.

October 3, 1962 - King's attorney obtained oral extension of time from one of plaintiff's attorneys to answer Interrogatories and mailed a written Stipulation to plaintiff's attorney concerning the extension. Later on this same day, King's attorney attempted to call King by long distance telephone at Vero Beach, Florida, and reached King's son, Mr. Andrew King and learned for the first time of the death of Anderson King more than two years before. The reasons King's attorney had not felt it necessary to attempt to communicate with King during this time are set out in his affidavit printed in the record below, and were principally because of the congested condition of the Civil calendar of the Federal Court for the Eastern District of North Carolina, which meant there had been no reason to sooner prepare for trial.

November 6, 1962 - King's attorney filed objections to Interrogatories and noted therein the death of King.

November 27, 1962 - King's attorney furnished copies of Certificate of Death and of Order of Discharge of Mrs. King as Administratrix to plaintiff's attorneys at a hearing before District Judge Preyer.

December 7, 1962 - Plaintiff moved to substitute Mrs. Evva Gertrude King, a Florida resident, as defendant, contending that she was the Administratrix of the estate of Anderson J. King, *even though plaintiff recited in her motion*

that Evva Gertrude King was discharged as Administratrix on April 20, 1962. The undersigned attorneys who had been representing Anderson J. King objected to this motion.

January 30, 1963 - Hearing before Judge Preyer on plaintiff's motion to substitute. King's attorneys appeared, objected and filed a brief in opposition to the motion.

January 31, 1963 - Judge Preyer signed an order attempting to substitute Mrs. King as defendant, and provided that defendant could appeal.

March 7, 1963 - The attorneys who had been representing Anderson J. King obtained an order from Judge Preyer providing that the certificate of appeal be dissolved, but that this order be without prejudice if the defendant desired to raise the same question if an appeal on the merits should ultimately become necessary. (This order appears in the record printed in the Court below.)

October 11, 1963 - Trial before Judge Bell. During plaintiff's presentation of evidence, a Stipulation was entered into with respect to the appointment of Mrs. King as Administratrix and the entry of the Order or letters of Final Discharge as Administratrix on April 20, 1962. At the trial the undersigned attorneys, representing Mrs. Evva Gertrude King, contended that she was not properly a party defendant and that she was not the Administratrix of Anderson J. King and moved for an involuntary dismissal.

October 22, 1963 - Opinion filed by Judge Bell.

October 29, 1963 - Judgment entered, reciting that Blanche J. Simmons, Administratrix of the Estate of Croner G. Simmons, deceased, have and recover of the defendant Evva Gertrude King, Administratrix of the Estate of Anderson J. King, deceased. the sum of $24,750.00.

This case was tried before the Honorable J. Spencer Bell, sitting without a jury, and he entered Findings of Fact and Conclusions of Law.

The Petitioner appealed to the Court of Appeals on the following grounds:

(1) There was no evidence of negligence on part of Anderson J. King.

(2) That incompetent evidence had been admitted.

(3) That the substitution of Evva Gertrude King as defendant was improper when the record showed Anderson J. King had been dead for more than two years.

(4) That the substitution of Evva Gertrude King as defendant was improper when the record showed she had been discharged as Administratrix for nine months.

(5) That the entry of a judgment against her was invalid.

(6) That the Court had no jurisdiction over her person.

Grounds (1) and (2) above were not included in the Petition for Rehearing and are not involved in this Petition for Certiorari.

On June 10, 1964, the Court of Appeals for the Fourth Circuit in its opinion affirmed the decision of the Trial Judge. Thereafter, on July 8, 1964, the Petitioner herein petitioned for a rehearing which Petition was denied on July 16, 1964.

REASONS WHY THIS PETITION SHOULD BE ALLOWED

1. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONTRARY TO THE MANDATE OF RULE 25 (a), FEDERAL RULES OF CIVIL PROCEDURE, PRIOR TO THE AMENDMENT, EFFECTIVE JULY 1, 1963, AND IS IN CONFLICT WITH THE DECISION OF JUSTICE DOUGLAS, AS CIRCUIT JUSTICE, IN THE CASE OF MALONEE v. FAHEY, CA 9, 1952, 200 F. 2d 918, WHICH

DECISION HOLDS THAT ONLY THE LEGAL REPRESENTATIVE OF THE ESTATE MAY BE SUBSTITUTED UNDER RULE 25 (a) AND JUSTIFIES REVIEW AND SUPERVISION BY THIS COURT.

2. THE HOLDING OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT A JUDGMENT MAY BE RENDERED AGAINST A PERSON WHO IS MERELY DESIGNATED AS THE PERSONAL REPRESENTATIVE OF A DECEASED DEFENDANT WHEN IN FACT AND ON THE RECORD SHE IS NOT SUCH PERSONAL REPRESENTATIVE, IS VIOLATIVE OF THE CONSTITUTIONAL RIGHTS OF THE ESTATE OF THE DECEASED ORIGINAL DEFENDANT AND OF THE INDIVIDUAL NAMED AS SUCH REPRESENTATIVE, WHICH REQUIRES REVIEW BY THIS COURT.

3. THE COURT DID NOT ACQUIRE JURISDICTION OVER THE PERSON OF THE DEFENDANT EVVA GERTRUDE KING, EITHER AS THE PERSONAL REPRESENTATIVE OF THE DECEASED ORIGINAL DEFENDANT OR IN HER INDIVIDUAL CAPACITY, AND THE JUDGMENT RENDERED BY THE COURT BELOW IS A NULLITY, IS VIOLATIVE OF THE RIGHTS OF THE DEFENDANT UNDER THE CONSTITUTION OF THE UNITED STATES, AND SUCH DECISION AND JUDGMENT SHOULD BE REVIEWED BY THIS COURT.

AMPLIFICATION OF REASONS WHY A WRIT OF CERTIORARI SHOULD BE ALLOWED

I.

THE MANDATORY LANGUAGE OF RULE 25 (a) (IN EFFECT AT THE TIME OF THE ATTEMPTED SUBSTITUTION) WAS NOT FOLLOWED BY THE

DISTRICT COURT WHEN IT ALLOWED SUBSTITUTION OF A DEFENDANT WHEN THE PARTY DEFENDANT HAD BEEN DEAD FOR MORE THAN TWO YEARS. (Question 1)

At the time of District Judge Preyer's order substituting Mrs. King as defendant, Anderson J. King had been dead for more than two years. Rule 25(a) of the Federal Rules then in effect (prior to the July 1, 1963 amendment) provided that if substitution of proper parties was not made within two years, ". . . the action *shall* be dismissed."

This attempted substitution was not made within two years and the action should have been dismissed under his mandatory language.

This Court passed upon Rule 25(a) prior to its amendment, in *Anderson* v. *Yungkau,* (1947) 329 US 482, 67 S. Ct. 428, 91 L.Ed. 436. In that case the Court said:

> ". . . Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two-year period. In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25(a) that if substitution is not made within that time the action 'shall be dismissed' as to the deceased. *The word 'shall' is ordinarily 'the language of command.' Escoe v. Zerbst,* 295 US 490, 493, 79 L.Ed. 1566, 1569, 55 S.Ct. 818. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States, ex rel. Siegel v. Thomas,* 156 US 353, 360, 39 L.Ed. 450, 452, 15S.Ct. 378.
>
> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates both as a statute of limitations upon

revivor and as a mandate to the court to dismiss an action not revived within the two-year period. Rule 6(b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25(a) had, without more, set a two-year period within which substitution might be made. But Rule 25(a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. *That is action required of the court, not of a party.*

". . . But it is not enough to say that if Rule 6(b) and Rule 25(a) are construed to permit substitution after the two-year period, the court need not allow it where unfairness or prejudice would result. For the normal policy of a statute of limitations is to close the door - finally, not qualifiedly or conditionally. The federal law embodied in Rule 25(a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary. Affirmed." (italics supplied)

Two things should be noted in connection with the *Yungkau* decision. First, it is noted that through no lack of diligence petitioner failed to learn of the facts until more than two years later, yet even so, the Court refused to allow substitution. The other is that at the time of the *Yungkau* decision, Rule 6(b) did not list Rule 25 as one of the matters that could not be extended by the District Court. Rule 6(b) was amended in 1946 to include Rule 25 in the list of matters in which the District Court could not enlarge the time, emphasizing the mandatory nature of Rule 25.

(See Moore's Federal Practice Civil Rules & Official Forms, Pamphlet as amended 1963, page 632.)

A further indication of the mandatory nature of Rule 25(a), in addition to the amendment to Rule 6(b), as above noted, is the fact that although, both in 1946 and again in 1955, the Advisory Committee recommended that Rule 25(a) be amended, this court did not adopt those recommendations. (The rule was amended in 1963.) (Rule 25(a) is discussed in the comments in Moore's Federal Practice, Civil Rules and Official Forms, Pamphlet, 1963, pages 763 and 764. At the time Rule 25 was amended, Rule 6(b) was also amended, in 1963.)

Since the *Yungkau* case, a number of courts have upheld the validity of Rule 25.

Hofheimer v. *McIntee*, 179 F. 2d 789

Zdanok v. Glidden Co., Durkee Famous Foods Division, 28 FRD 346 (1961)

Starnes v. *Penn. RR Co.*, 26 FRD 625 (1961), aff'd 295 F. 2d 704

Conley v. *Gibson*, 29 FRD 519 (1961)

Fleming v. Sebastiani, 161 F.2d 111

The plaintiff has relied upon *Iovino* v. *Waterson*, 274 F. 2d 41 and *Perry* v. *Allen*, 239 F. 2d 107 as authorities for substitution. However, the two cases are in conflict and not controlling because *Perry* v. *Allen*, *supra* held that Rule 25(a) was invalid, which decision is contrary to the Supreme Court's holding in the *Yungkau* case. *Iovino* v. *Waterson*, *supra* was decided on the theory of estoppel and the defendant contends that her counsel cannot in effect, change the Federal Rules nor can a so-called estoppel change the mandatory nature of the Rule.

In the *Iovino* case, the Court said: "In our view, therefore, the order of substitution can be sustained only if plaintiffs may be treated as if they had met the two-year limitation because *a Court will not allow defendant to claim*

the contrary." (italics supplied) Even if this be so, this ignores the mandatory language of Rule 25.

The question here presented is not whether the defendant is in a position to claim a right under the rule, but simply whether the Court "shall dismiss" the action where the personal representative of the deceased is not substituted within two years. *The Rule commands the court to act irrespective of any claim or act of a party.*

As a justification for not enforcing Rule 25(*a*) the Circuit Court in its opinion advanced the theory of estoppel based upon the taking of a deposition and the serving of interrogatories by defendant's counsel after but without knowledge of King's death. It is submitted that the complete answer to this reasoning is the fact that defendant's counsel's conduct cannot under North Carolina law constitute grounds for estoppel, and that the clear mandate of Rule 25(a) cannot be avoided by estoppel.

The so-called estoppel is based upon the fact that after the death of King, his counsel took one deposition and served one set of interrogatories. This amounts to penalizing defendant because his counsel prepared for trial. Under the local rules then and now in existence in the Eastern District of N. C., an attorney is required to complete discovery within 4 months after the case is at issue. It is submitted that it has always been the policy of the Federal Rules to encourage discovery procedure. Under the reasoning adopted by Judge Preyer, as shown by the order of substitution, if defendant's counsel had not prepared for trial by taking a deposition and serving interrogatories, the action would have been dismissed. Could it be reasonably said that this action constituted an estoppel under the definition of estoppel as adopted by the N. C. Court as hereinafter set out? If, under Rule 6(b), the District Court could not extend the time within which substitution could be made, surely defendant's counsel could

not extend the time by taking a deposition and serving interrogatories.

Then too, should not estoppel work both ways? This action was instituted on December 4, 1959 and thereafter the plaintiff took no steps in the case until after the pre-trial conference two years and 9½ months later. Not until September 21, 1962, did plaintiff serve interrogatories. Had these interrogatories been served sooner plaintiff would have learned of King's death. If estoppel is to apply, then plaintiff is surely estopped for failure to take any steps in the case for more than 2 years and 9½ months.

The North Carolina Court has discussed estoppel in several cases, and *In Re Will of Covington*, 252 NC 546, 114 SE 2d 257, the Court quoted from *Hawkins* v. *Finance Corporation*, 238 NC 174, 77 SE 2d 669, as follows:

> ". . . in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming estoppel, they are: (1) lack of knowledge and the means of knowledge of the truths as to the facts in question; (2) reliance upon

the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." (citing cases)

Defendant's counsel had no knowledge of the death of Mr. King until late in the afternoon of October 3, 1962, as shown in his affidavit printed in the Appendix below (Transcript of Record, Page 1), and there was no effort by him to conceal the fact of Mr. King's death. There was no conduct to create any estoppel under the rules quoted above, and no action on plaintiff's part in reliance upon any conduct of defendant's counsel.

It is true that Rule 25(a) has been said to be a harsh rule, and has since been amended; but neither the deceased defendant nor his widow made the rule. The Supreme Court of the United States made the rule and it is in "the language of command" and Anderson J. King's widow is entitled to any benefit afforded by the Rule.

II.

BY ITS DECISION IN THIS CASE, THE DISTRICT COURT, SANCTIONED BY THE CIRCUIT COURT, HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW, AND HAS DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THE EXERCISE OF THIS COURT'S POWER OF REVIEW AND SUPERVISION IS JUSTIFIED. (Rule 19 1(b)) (Questions 2 and 3)

(a) It is clear that from the record that at the time Judge Preyer attempted to substitute Evva Gertrude King as defendant, she had been discharged as his Administratrix by the Probate Court in Florida more than nine months prior thereto and more than seven months before plaintiff's Motion

for Substitution was filed. Once she was so discharged she had no official or representative capacity whatever and Judge Preyer's order could have no more legal effect than if he attempted to substitute any other resident of Florida. The applicable North Carolina law, revealed by the North Carolina Statutes, and by decisions of the Supreme Court of North Carolina, provides that a recovery can be had against the estate of a deceased person *only against and through the properly appointed, qualified and acting personal representative of the deceased.*

McIntyre v. *Josey*, 239 NC 109, 79 SE 2d 202 (1953)

N. C. Gen. Statute 28-172*

N. C. Gen. Statute 28-176**

Therefore, proof of the existence of a defendant and the defendant's capacity to be sued is a fundamental part of the plaintiff's case and is not a subject of waiver, at least by attorneys representing a person who is not the duly appointed and acting Administratrix. A plaintiff's proof must include evidence of the appointment and qualification and existence of a personal representative of a deceased person. Both under

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*N. C. G. S. 28-172

"*Action survives to and against representative.* - Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate."

** N. C. G. S. 28-176

"*To sue or defend in representative capacity.* - All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity."

common law pleading and code pleading, a party must allege and prove the necessary elements of a cause of action.

Citizens Bank of Marshall v. *Gahagan*, 210 NC 464 187 SE 580 (1936)

The decision in this case amounts to a holding by the District Court, sanctioned by the Court of Appeals, that it is not necessary under North Carolina law to prove that a person sued in a representative capacity is such representative, by holding that such proof was waived, and the decision thus completely negatives the statutes above referred to.

Since Evva Gertrude King had been discharged as Administratrix, Judge Preyer's order could have no more effect than if he had attempted to substitute any other resident of Florida. This does not necessarily mean that the plaintiff had no remedy. (Subject however to Rule 25 of the Federal Rules and other applicable law) The Florida law* provides that the discharge of the personal representative shall not prevent a revocation of the order of discharge or the issuance of letters of administration, if it becomes necessary or proper for any cause that further administration be had.

Florida Statutes, Sec. 734.26

In *Mallonee* v. *Fahey*, CA 9, 1952, 200 F 2d 918 the Court held that a party cannot be substituted under Rule 25 who is not the legal representative of the deceased party.

**Florida Statute* 734.26: "The final settlement of an estate and the discharge of the personal representative shall not prevent a revocation of the order of discharge or the subsequent issuance of letters testamentary or of administration if other property of the estate is discovered or if it becomes necessary or proper for any cause that further administration of the estate be had."

The Circuit Court attempts to avoid this decision by holding that the defendant waived the defendant's lack of capacity to be sued as administratrix. However, it is contended that nothing defendant's counsel did or failed to do amounted to a waiver, and that under North Carolina law, as pointed out above, this fundamental requirement of North Carolina law is not the subject of waiver.

It is clear that the defendant has always objected to the attempted substitution, and in the brief filed by defendant on that point before Judge Preyer, defendant points out that: "It would be harsh and oppressive to reopen this estate months after it was settled and closed *and the administratrix discharged.* The plaintiff had time to learn of defendant's death and to call for substitution but failed to do so. The orderly settlement of estates and the rights acquired thereunder would be adversely affected if this substitution is made. Who knows what contracts the defendant's widow may have entered into, in the belief that the property she received in the final settlement of her husband's estate was hers, free and clear of any liens or claims." Further, defendant made the objection at the trial before Judge Bell that the defendant *was not the administratrix and moved for an involuntary dismissal.*

A waiver is defined by the North Carolina court as: "An intentional relinquishment of a known right."

Jones v. *Ins. Co.*, 254 NC 407, 119 SE 2d 215 (1961)

Green v. *P. O. S. of A.*, 242 NC 78, 87 SE 2d 14 (1955)

It is abundantly clear that the defendant in this case has never intended to waive any rights, has always objected to the substitution, and still objects.

Then too, even if something was done by the substituted party that would amount to a waiver, it cannot be a waiver if that party was not authorized to act. No person who is

not the administratrix can bind an estate, either by action or by inaction, nor can his attorney.

> 21 Am. Jur., Sec. 207, Executors and Administrators, page 487.

Furthermore, Mr. Justice Douglas, as Circuit Justice, stated for the Court in the case of *Mallonee* v. *Fahey; supra, supra,* CA 9, 1952, 200 F 2d 918, that the District Court has no power under Rule 25(a) F. R. C. P. to substitute a party who is not the legal representative of the deceased party. Clearly, this lack of power under Rule 25(a) F. R. C. P. cannot be supplied by any inaction on the part of a substituted party who is not duly qualified to represent the estate or her attorney.

Where it affirmatively appears on the face of the record that there is no existing administrator, the existence of an administrator cannot be established by waiver or estoppel. The Court has, in effect, held that the defendant has waived a right merely because counsel did not formally point out the obvious fact, appearing in plaintiff's own motion, that the defendant was not the administratrix of the deceased. This should not be the law, even if counsel had not objected in person at the hearing and in the written brief filed in opposition to the motion to substitute as quoted above.

In reaching its decision the Circuit Court misinterpreted the holding in the case of *Bush* v. *Remington Rand, Inc.*, 213 F 2d 456, (2d Cir. cert. den., 348 U.S. 861 (1954)). In its opinion in this case the Circuit Court cites the *Bush case* as authority for the proposition that there had been a waiver of the right to object to the Petitioner's capacity in the present case. The *Bush case, supra, is not in point* and does not stand for the proposition for which it is cited by the Circuit Court. A reading of the *Bush case* reveals that the Court held the defendant in that case had waived his right to object to the *timely substitution* of a personal representative for a de-

ceased plaintiff. The facts clearly show that when the personal representative was substituted, the *personal representative was at that time the duly appointed and acting personal representative* of the plaintiff's estate. In the *Bush case* the Court did not hold that the Court could have substituted someone *not* a legally qualified personal representative, nor did it intimate that the defendant could waive *that* requirement under those facts.

The Respondent, in her motion to substitute the Petitioner as a defendant under Rule 25(a) of the Federal Rules of Civil Procedure, stated: " . . . wherefore, the plaintiff now moves the Court to revive this action against Evva Gertrude King, Administratrix of the Estate of Anderson J. King, Deceased (*or against some other duly appointed personal representative of the said Anderson J. King, in the event it should not prove feasible to continue this action against Evva Gertrude King*) and to substitute the said Evva Gertrude King, Administratrix of the Estate of Anderson J. King, deceased, (*or such other personal representative of the said Anderson J. King as may be duly appointed*) as a defendant herein." (italics supplied) The foregoing clearly shows that the Respondent knew she must have the Petitioner reappointed as Administratrix or have some "other duly appointed personal representative" appointed so as to have a party defendant properly substituted pursuant to the motion filed by Respondent. *The failure of the Respondent to follow through on this essential part of her case should not be charged against the Petitioner or held to be a waiver of the fundamental requirement that an estate be held liable only through a qualified personal representative.*

Finally, under Rule 17, the capacity of a person sought to be sued in a representative capacity is determined by the law of the state in which the District Court is held, in this case, North Carolina. As pointed out above, the law of North Carolina is that a *foreign* administrator has no capacity to

be sued or defend an action in his representative capacity. Therefore, there can be no recovery in this state against a *foreign* administratrix.

G.S. 28-176

Brauff v. Comr. of Rev., 251 NC 452, 111 SE 2d 620 (1959)

Cannon v. *Cannon*, 228 NC 211, 45 SE 2d 34 (1947)

(b) By its decision in this case the District Court, sanctioned by the Court of Appeals, has set a precedent that results in the interference by the Federal Courts in the orderly administration and settlement of decedents estates.

III.

THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA ACQUIRED NO JURISDICTION OF THE PERSON OF EVVA GERTRUDE KING NOR OF THE ESTATE OF ANDERSON J. KING. (Question 4)

Under the facts of this case, Evva Gertrude King was discharged and no longer was, in fact, the personal representative of Anderson J. King. Secondly, under the law of North Carolina, which is applied under Rule 17(b) of Federal Rules of Civil Procedure, Evva Gertrude King could not sue or be sued in North Carolina since, even if she were the duly qualified and acting personal representative, she had no capacity in North Carolina to represent the deceased's estate.

Cannon v. *Cannon*, *supra*

Brauff v. *Comr. of Rev.*, *Supra*

Furthermore, the incapacity of Evva Gertrude King under either of the above grounds goes to the question of jurisdiction of the Courts of North Carolina (or a Federal District Court in a Diversity case) over the person of Evva Gertrude King, an individual residing in the State of Florida.

The District Court in North Carolina had no jurisdiction over the person of Evva Gertrude King unless she were a "proper party" under Rule 25(a) to be substituted and served under the terms of said Rule. It is respectfully submitted that since she was not the personal representative when served with the notice of Motion for Substitution, the Court could not acquire jurisdiction over her person, and that her appearance and objection at the time of trial to her substitution preserved her rights. Therefore, entry of judgment against her as Administratrix was in abrogation of her constitutional right of due process of the law under the Fifth Amendment to the Federal Constitution and was likewise in abrogation of the same Constitutional right of the estate of Anderson J. King.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIS SMITH, JR.
HENRY MITCHELL, JR.
Raleigh, North Carolina
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9307.

Blanche J. Simmons, Administratrix of the Estate of Croner G. Simmons, Deceased, Appellee,

versus

Evva Gertrude King, Administratrix of the Estate of Anderson J. King, Deceased Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. J. SPENCER BELL, CIRCUIT JUDGE, SITTING BY DESIGNATION AS DISTRICT JUDGE.

(Argued April 13, 1964 Decided June 10, 1964.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

Willis Smith, Jr., and Henry A. Mitchell, Jr., (Smith, Leach, Anderson & Dorsett on brief) for Appellant, and John V. Hunter, III, and Howard E. Manning (Manning, Fulton, Skinner & Hunter; and Young, Moore & Henderson on brief) for Appellee.

SOBELOFF, Chief Judge:

This litigation stems from a collision between a tractor trailer driven by Anderson J. King, appellant's decedent, and a delivery truck driven by Croner G. Simmons, appellee's decedent. In the collision Simmons was killed and his widow, as administratrix of his estate, brought suit against King. Before the case was tried King died of causes unrelated to the accident and his widow, administratrix of his estate, was substituted as party-defendant. The issues pertain to the sufficiency of the evidence of negligence and the propriety of the substitution of King's widow as a party-defendant.

I

The evidence as to negligence and contributory negligence was in sharp conflict. The District Court, sitting without a jury, found as a fact that King was in his tractor trailer, southbound on Route 301, when, with the apparent intention of making a left-hand turn, he entered the northbound lane in front of the northbound truck of the plaintiff's decedent. King did not first ascertain that the movement into the northbound lane could be made with safety. There was testimony by the driver of another tractor trailer traveling southward behind King that he (the witness) was about to pass on King's left; that the witness, observing King's left-hand turn signal, returned to his (the witness') original position in the southbound lane; that during the brief interval when he was in the northbound lane he did not notice the lights of any northbound traffic. From this, the defendant argued that Simmons' lights were not burning, and that the collision was occasioned by his fault.

There was testimony, on the other hand, that after the collision the panel light switch on Simmons' delivery truck was found "pulled out" or in the "on" position for the headlights, and that the lights on the vehicle had been, according to a witness, burning an hour before the accident. The District Court resolved the conflict by accepting the plaintiff's version, and found that Simmons' lights were properly burning and that the collision resulted solely from the negligence of King.

We hold that there was adequate basis for the District Court's resolution of the disputed facts and, since it cannot be deemed clearly erroneous, we let it stand.

II

The second issue concerns the propriety of the court's allowing Mrs. King, as administratrix of her husband's estate, to be substituted as party-defendant in the place of her husband. Her contention is that, more than two years having elapsed before the plaintiff requested the substitution, the mandatory prohibition of Rule 25(a) (1), Fed.R.Civ.P., forbade such substitution and required dismissal of the suit. The pertinent portion of the rule states: "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties * * *."* The District Court concluded that the defendant was estopped to raise this objection and permitted the substitution.

---

*This rule has since been revised to permit substitution within ninety days after notification of the death of a party. See 1963 Amendment to Rule 25(a)(1), Fed.R.Civ.P.

Reviewing the chronology of the case, it appears that the action was filed in the state court in December of 1959 and removed to the federal court the same month. King, the original defendant, died on September 11, 1960. Thereafter, his attorney gave notice on December 29, 1960, for the taking of a deposition of a witness on January 11, 1961. The defendant served interrogatories upon the plaintiff on December 19, 1961. A pretrial conference was held on September 18, 1962, and thereafter the plaintiff addressed interrogatories to the original defendant. The defendant's attorney replied on October 3, 1962, by requesting additional time to answer. Finally, on October 6, 1962, defense counsel learned that his client had died more than two years earlier. Within ten days after being advised of this fact by defense counsel the plaintiff moved to substitute Mrs. King, the administratrix, in place of the dead defendant.

In Iovino v. Waterson, 274 F. 2d 41 (2d Cir. 1959), *cert. denied,* 362 U. S. 949 (1960), it was held that a defendant who received service, answered the complaint, and participated in pretrial conferences without knowing of his client's death was estopped to assert the two-year limitation of Rule 25. Our case is on all fours with *Iovino.*

Moreover, the fact that Mrs. King had been relieved of her official status as an administratrix at the time of the substitution does not affect this result. The defendant made no objection to the substitution on this ground until the day of trial, approximately ten months after the substitution was originally proposed. Nor did the defendant advance this ground when he challenged the substitution or in the hearing that followed. The substitution was duly made after authorization by the District Court. The defendant's failure to voice this ground of objection until later constitutes a waiver of any

possible complaint on that ground. See *Bush* v. *Remington Rand, Inc.*, 213 F. 2d 456 (2d Cir.), *cert. denied*, 348 U. S. 861 (1954). The District Court committed no error in its ruling on this procedural point nor in allowing recovery to the plaintiff.

Affirmed

Office-Supreme Court, U.S.
FILED
OCT 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 509

EVVA GERTRUDE KING, ADMINISTRATRIX OF THE ESTATE OF ANDERSON J. KING, DECEASED,
Defendant—Petitioner

v.

BLANCHE J. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF CRONER G. SIMMONS, DECEASED,
Plaintiff—Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1964

No. 509

EVVA GERTRUDE KING, ADMINISTRATRIX OF THE ESTATE OF ANDERSON J. KING, DECEASED,

Defendant—Petitioner

v.

BLANCHE J. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF CRONER G. SIMMONS, DECEASED,

Plaintiff—Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OBJECTIONS TO JURISDICTIONAL GROUNDS

The respondent contends there are no special and important reasons for a review on writ of *certiorari* under Supreme Court Rule 19 in this case. The decision of the Court of Appeals for the Fourth Circuit in affirming the judgment below is not in conflict with decisions of other Courts of Appeals, or decisions of the United States Supreme Court. Furthermore, a change in the applicable statutory law, Federal Rules of Civil Procedure 25 (a), after this action was begun, has rendered this action a matter of concern only between the petitioner and respondent and no longer a matter of public concern.

STATEMENT OF FACTS

In view of the questions raised by the petitioner in her petition, the following chronology of events in his case is important:

1. On December 4, 1959, this action was commenced in the Superior Court for Wake County, North Carolina, by the issuance of summons and the filing of respondent's complaint, and the summons and complaint were on the same day served upon the North Carolina Commissioner of Motor Vehicles as statutory process agent for the defendant, a non-resident motorist, and all necessary further steps for service on the defendant, including the sending of the summons and complaint to him by registered mail, were completed.

2. On December 22, 1959, the attorneys for the defendant filed a petition to remove this case to the United States District Court for the Eastern District of North Carolina, and also filed a notice of removal and bond on removal. The case was removed to the said Court.

3. On December 29, 1959, the defendant's attorneys filed an answer in his behalf admitting the collision, denying liability, and counterclaiming for $1,427.64 in property damage.

4. On January 7, 1960, the respondent moved the District Court for an order striking the Fifth Defense from the defendant's answer, on the grounds that it failed to state a legal defense.

5. On May 19, 1960, attorneys for the defendant gave notice of taking, pursuant to the Federal Rules of Civil Procedure, the oral deposition of one Frank Linn, a witness to the collision, on June 2, 1960, in Stuart, Florida. The said deposition was not taken pursuant to this motion.

6. On September 11, 1960, the defendant, Anderson J. King, died in New York of natural causes.

7. On December 29, 1960, the defendant's attorneys gave notice of the taking of the Linn deposition in Florida on January 11, 1961.

8. On January 11, 1961, the said deposition was taken in Florida, with both parties being represented by Florida attorneys.

9. On December 19, 1961, the defendant's attorneys filed continuing interrogatories under Federal Rule 33.

10. On December 28, 1961, the respondent answered certain of these interrogatories, objected to others, and objected to the continuing nature of the interrogatories.

(a) The plaintiff filed a Statement of Evidence, Proposed Issues, and Statement of Facts.

(b) The attorneys for the defendant filed a document entitled "Defendant's Testimony," stating, among other things, that the defendant "proposes to establish *by his own testimony*" certain facts, and might offer the testimony of a highway patrolman to corroborate this testimony.

(c) The Court signed a Consent Order extending the time for completion of discovery to November 1, 1962. This Order was signed by the attorneys for the respondent and the attorneys for the defendant.

13. On September 21, 1962, the respondent, pursuant to Federal Rule 33, filed interrogatories addressed to the defendant. On the same day, a stipulation as to facts and exhibits was filed by the attorneys for both parties.

14. On September 28, 1962, a Pre-Trial Order, dated September 22, 1962, was filed by the Court, stating among other things: "Both parties anticipate that the same will be ready for trial upon completion of discovery on November 1, 1962, without the necessity of additional Pre-Trial Conference. The case is therefore calendared for trial at the next Civil Term to convene in the Raleigh Division after November 1, 1962."

15. On October 3, 1962, the attorneys for the defendant mailed to the attorneys for the respondent a stipulation extending time to answer or object to respondent's interrogatories which were filed on September 21, 1962. The letter accompanying the stipulation stated, among other things:

> "We need time in order to get up with our client who, as you know, is a long-haul truck driver."

16. On November 6, 1962, the attorneys for the defendant filed objections to the respondent's interrogatories, in which they stated that they had learned, for the first time, on October 3, 1962, that the defendant was dead. It was only upon the receipt of these objections that the attorneys for the respondent, and the respondent herself, learned that the defendant had died. Neither the attorneys for the respondent nor the respondent herself knew at this time that the defendant had been dead for any considerable period of time, and assumed that his death was quite recent, because of the various procedural and other steps which both parties had taken at intervals throughout the history of the case, which would not have been appropriate had the defendant been dead.

17. On November 27, 1962, the respondent's attorneys, and through them the respondent, learned for the first time, through the attorneys for the defendant, that the defendant had in fact been dead for a considerable period of time, namely, more than two years.

18. The attorneys for respondent, on December 5, 1962, received from the attorneys for the defendant, photostatic copies of official records indicating (1) that the defendant, while still a resident of Vero Beach, Indian River County, Florida, died in Portland, New York, on September 11, 1960; (2) one Evva Gertrude King was appointed administratrix of the defendant's estate by the County Judge's Court in and for Indian River County, Florida, administered the estate, and filed a petition for

final discharge and final returns which were approved by the County Judge on April 20, 1962.

19. On December 7, 1962, the respondent filed a motion with the District Court suggesting the death of the defendant Anderson J. King and requesting that his administratrix, Evva Gertrude King, be substituted as defendant. Notice of the motion and hearing was served on Evva Gertrude King, Administratrix of the estate of Anderson J. King, in Florida by a United States Marshal.

20. On January 31, 1963, after a hearing at which Evva Gertrude King was represented by Mr. Willis Smith, Jr., of Smith, Leach, Anderson and Dorsett, Judge Preyer signed an order reciting that Evva Gertrude King was administratrix of the estate of Anderson J. King, and making her defendant in the place of Anderson J. King. (Appellant's Appendix p. 66). In this order, Judge Preyer, at the request of counsel for the defendant, stated his opinion that the order involved a controlling question of law within the meaning of 28 U.S.C. Sec. 1292 (b), so that an immediate appeal might materially advance the ultimate termination of the litigation.

21. Subsequently, counsel for the petitioner decided not to pursue an appeal prior to the trial of the case on the merits, and on March 7, 1963, Judge Preyer, at the request of counsel for the petitioner, entered an order reciting that Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, had elected not to appeal under the order and certification of January 31, 1963, but desired to preserve any rights the petitioner might have to object to the Court's ruling that Evva Gertrude King, administratrix of the estate of Anderson J. King be substituted as a party defendant in place of Anderson J. King, *for the reasons set out in the brief filed by the defendant in opposition to said motion for substitution of defendant Evva Gertrude King*, and dissolving the certification for appeal without prejudice in the event that the defendant desired to raise the same question if an appeal on

the merits ultimately became necessary. (Appellee's Appendix, p. 15A). *The defendant's brief in opposition to the motion for substitution of the original defendant's administratrix did not set out, as a reason for opposition to the motion, any claim or argument that Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, because of her discharge, had no capacity to represent the defendant in this action.*

22. On July 18, 1963, there was filed with the Clerk of the United States District Court for Eastern North Carolina a Stipulation of Fact wherein it was stipulated that the tractor-trailer which was owned by Anderson J. King, and which was involved in the accident out of which this case arose, was damaged in the amount of $1,427.64 as a result of said collision. It was signed for the defendant, Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, by Henry A. Mitchell, Jr. and by counsel for the plaintiff.

23. On the morning of October 7, 1963, just prior to the beginning of the trial on the merits, Mr. Willis Smith, Jr., attorney for the defendant, called the plaintiff's attorneys into Judge Bell's chambers and *for the first time* orally raised the question of whether the action could proceed against Mrs. King as the original defendant's administratrix, when she had been discharged as administratrix, no re-appointment had been made, and the estate had not been reopened. Judge Bell refused to dismiss the action for this reason, and after trial by the Court, entered judgment for the plaintiff in the amount of $24,750.00.

24. The petitioner, Evva Gertrude King, was present in the courtroom of the United States District Court for the Eastern District of North Carolina on October 7, 1963, when this action was tried and participated in the trial by sitting with her counsel.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HOLDING THAT THE PETITIONER WAS ESTOPPED TO ASSERT THE TWO-YEAR LIMITATION OF RULE 25, FEDERAL RULES OF CIVIL PROCEDURE WAS PROPER.

The Court of Appeals for the Fourth Circuit in affirming the decision of the District Court that the petitioner was estopped to assert the two-year limitation of Federal Rule of Civil Procedure 25 (a) (1) said the case at the bar was on all fours with *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959), *certiorari denied*, 362 U.S. 949, 80 Sup. Ct. 860, 4 L. Ed. 2d 867 (1960).

As will appear from the chronology of events in the case at bar, printed as part of the respondent's statement of facts, the original defendant, Anderson J. King, died of natural causes after this suit was filed, and for a long period of time the fact of his death was unknown to the attorneys on both sides of the litigation. The action was commenced in state court on December 4, 1959, and was removed on December 22, 1959. On September 11, 1960, the original defendant, Anderson J. King, died in New York State of natural causes. On December 29, 1960, his attorneys gave notice of the taking of a deposition in Florida on January 11, 1961, which was in fact taken on that date. On December 19, 1961, his attorneys filed continuing interrogatories under Federal Rule 23, which were answered in part and objected to in part by the plaintiff on December 28, 1961. A pre-trial conference was held on September 18, 1962, at which the original defendant's attorneys appeared and represented him as if he were alive, stating among other things that they proposed to establish certain facts by the testimony of the defendant himself, who by this time had been dead for more than two years. On September 21, 1962, the respondent filed interroga-

tories addressed to the original defendant, and on October 3, 1962, the original defendant's attorneys mailed the attorneys for the respondent a stipulation extending time to answer or object to the interrogatories, stating among other things that they needed time to get in contact with their client. At this time their client had been dead for two years and twenty-two days. On November 6, 1962, the attorneys for the original defendant informed the attorneys for the respondent, for the first time, that the original defendant was dead, and it was only on November 27, 1962, that the respondent's attorneys learned for the first time, through the attorneys for the defendant, that the original defendant had in fact been dead for a considerable period of time, namely, more than two years. On December 7, 1962, the respondent filed a motion for the substitution of the administratrix of the deceased defendant, and notice of the motion and hearing thereon was served upon her personally in Florida by United States Marshal. On January 31, 1963, after a hearing at which she was represented by her present attorney, Judge Preyer signed an order reciting that she was administratrix and making her defendant in place of the original defendant, Anderson J. King, on the authority of *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959).

Judge Preyer and the Court of Appeals were correct in their conclusion that this case comes squarely within the rule of *Iovino v. Waterson*. In *Iovino*, as in the case at bar, the defendant's attorneys took steps after his death which would have been appropriate only had he still been alive, and which estopped the defendant's attorneys from taking advantage, under the then terminology of Federal Rule of Civil Procedure 25, of the plaintiff's failure to substitute the defendant's personal representative within two years of the defendant's death. In *Iovino*, the action was begun in March, 1955, in a State Court in New York. The defendant removed to the District Court. In April, 1955, the defendant died intestate, with the plaintiff's attorneys remaining ignorant of that fact. In May, 1955,

plaintiff's attorneys served a complaint on the attorney who appeared for the defendant, who accepted service and served an answer, and who in 1956, examined the plaintiff before trial and participated in pre-trial conferences in the District Court, without making mention of defendant's death. When the plaintiff's attorneys learned in the spring of 1958 that the original defendant had been dead for over two years, they promptly took steps to substitute an administratrix of the original defendant in his stead. On appeal, the District Court was held to have acted correctly in allowing this substitution even though it was made more than two years after the original defendant's death and even though a literal reading of the then language of Federal Rule of Civil Procedure 25 would not have allowed the substitution.

In an exhaustive opinion which sets forth in depth the history of the former version of Federal Rule of Civil Procedure 25 and various other applicable provisions of Federal law, and analyzes the cases construing them, a three-judge panel of the Court of Appeals for the 2nd Circuit held unanimously that under these circumstances the defendant's attorneys were estopped from taking advantage of the strict time limitation in Federal Rule 25. The holding in this regard is well summarized in the language of the Court at 274 F. 2d 51:

> "We need not go so far as to hold that an attorney appearing in the Courts of this Circuit is under a duty to keep himself and his adversary informed of his continued authority at all times. We do hold that an attorney so appearing must assure himself of the continued existence of his client before he takes affirmative steps in the client's behalf; that, in the absence of knowledge to the contrary, his adversary may properly assume he has done this; that a client who authorizes an attorney to represent him has impliedly so informed the adverse party; and that no advantage may be taken by the client's personal representative of the attorney's failure to ascertain the fact of the client's death."

If there be any distinction between the case at bar and *Iovino*, it is that the case at bar presents a stronger set of facts for reaching the same conclusion than did *Iovino*. Not only did the petitioner's attorneys in the case at bar take more steps in the period after their client's death than was the case in *Iovino*, they also, approximately two years after their client's death, informed respondent's attorneys and the Court at a pre-trial conference that they intended to prove certain facts by the testimony of the defendant, thereby directly leading respondent's attorneys to believe that the defendant still existed.

The petitioner seems to rely almost completely on *Anderson v. Yungkau*, 329 U.S. 482, 67 Sup. Ct. 428, 91 L. Ed. 436 (1947). The Court of Appeals in *Iovino* did not sidestep *Anderson v. Yungkau*, but dealt with it directly and decided it had no application to the state of facts in *Iovino*. As the Court of Appeals said in *Iovino*, at 274 F. 2d 50:

> "In *Anderson*, the Supreme Court was concerned with excusable neglect, not with estoppel."

By this petition, petitioner is seeking a writ of *certiorari* on almost identical facts as in *Iovino* where a writ of *certiorari* was denied and this with reference to a problem which has no future significance because of the 1963 Amendment to Federal Rule of Civil Procedure 25, which now allows substitution within ninety days of notice of the death of a party, regardless of how long the party has been dead. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 Sup. Ct. 614, 99 L. Ed. 897 (1955), a writ of *certiorari* had previously been granted. Upon learning that a statutory change had rendered the case a matter of concern only between the parties, the writ of *certiorari* was dismissed by the Court, Justice Frankfurter speaking for the majority said at 349 U.S. 70, 99 L. Ed. 904.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged con-

flict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of *certiorari* except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

Under these circumstances, it is difficult to see what useful purpose could be served by denying the respondent her day in court with respect to a claim which has already been found by the District Court and the Court of Appeals to be meritorious.

None of the District Court and Courts of Appeals decisions cited by the petitioner on Page 12 of her brief are apposite to the case at bar. In *Hofheimer v. McIntee*, 179 F. 2d 789 (7th Cir. 1950), and *Fleming v. Sebastiani*, 161 F. 2d 111 (9th Cir. 1947), we are not told what, if anything, transpired between the death of the party in question and the expiration of two years from that time. Further, both cases were decided well before *Iovino v. Waterson* and it is impossible to say what the attitude of the respective courts would have been had they been called upon to decide the legal implications of the *Iovino* fact situation. *Starnes v. Penn. R. Co.*, 26 F.R.D. 625 (E.D. N.Y. 1961), specifically cites *Iovino* and does not criticize it on its fact situation, but says, at 26 F.R.D. 629:

> "In the case at bar, there is nothing in the conduct of the defendant from which can be fashioned a waiver of the limitation or an estoppel to invoke the rule."

Such, too, is the situation in *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D. N.Y. 1961), wherein the District Court quotes *Iovino* without criticism and states, at 26 F.R.D. 347:

> "There are no circumstances here which would give rise to waiver and estoppel as against these defendants."

In *Conley v. Gibson*, 29 F.R.D. 519 (S.D. Tex. 1961), there are no factors which could give rise to estoppel, as in *Iovino* or the case at bar.

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT THE PETITIONER BY FAILING TO OBJECT TO HER SUBSTITUTION ON THE GROUND THAT SHE HAD BEEN RELIEVED OF HER OFFICIAL STATUS AS AN ADMINISTRATRIX UNTIL THE DAY OF TRIAL WAIVED ANY POSSIBLE COMPLAINT ON THAT GROUND WAS PROPER.

The petitioner argues in her brief that she could not properly be substituted, as administratrix of the deceased original defendant, because at the time of the substitution an order had been entered by the Florida Probate Court discharging her as administratrix. Upon examination of the proceedings in this case and the applicable law, it will be seen that this point is not well taken.

True, the defendant administratrix in the case at bar was not formally reappointed. The reason was that the defendant never, prior to the very day of the trial on the merits, objected to her substitution on the grounds that she was no longer administratrix; an examination of the record will show that the objection made was that her reappointment, coming more than two years after the death of the original defendant, was simply too late under the provisions of Federal Rule of Civil Procedure 25. Indeed, Judge Preyer, in his order of January 31, 1963, recited that "Evva Gertrude King is administratrix of the estate of Anderson J. King, deceased, and may properly be substituted as defendant in his stead." (Appellant's Appendix, 66, 67).

As a part of this order, the petitioner obtained Judge Preyer's leave to appeal the question of the substitution immediately under the provisions of the 1958 Amend-

ment to the Interlocutory Appeals Act, 28 U.S.C. Sec. 1292 (b). Subsequently, Judge Preyer dissolved this order at the request of the petitioner and allowed the petitioner to reserve the right to appeal this point for the grounds set forth in a brief filed by the petitioner. (Appellee's Appendix p. 15A). The brief referred to, which the petitioner did not bring up as part of the record, was addressed almost exclusively to the question of whether the petitioner could be substituted more than two years after the original defendant's death, only obliquely referred to the fact that the present petitioner had been discharged as administratrix and that to substitute her as defendant in the case would not be consistent with the orderly administration of estates, and in no respect raised the point that she might be an improper party because of pure lack of legal capacity, having been discharged, to represent and bind the estate of the defendant in this action.

Thereafter a period of several months elapsed, and it was only on the morning of the day of the trial on the merits before Judge Bell that the petitioner's attorney called the attorneys for the respondent into Judge Bell's chambers, raised the question whether the petitioner administratrix was properly in the case inasmuch as she had been discharged as administratrix, and asked that the action be dismissed for that reason. This conference in Judge Bell's chambers appears nowhere in the record, and the petitioner's attorney made no formal written or oral motion which appears in the record for dismissal of the case on the specific ground that the petitioner had no capacity to represent the estate of the original defendant. However, in fairness to the petitioner, the respondent felt it necessary at this point in the brief to bring the fact of the occurrence of this conference to the Court's attention.

The only formal motion made by the petitioner for dismissal of the case, on the ground that the petitioner had been discharged as administratrix and could not properly be in the case, is the petitioner's motion for involuntary

dismissal under Rule 41 (b), made at the end of the trial on the merits.

The fact is that the petitioner's attorney never made it clear to the trial court whether he represented the petitioner in her individual or representative capacity, or indeed whether he represented her at all. He appeared and represented her at the hearing on the original motion to substitute her as defendant. On the other hand, at the trial, in a colloquy with Mr. Manning and Judge Bell, he in effect refused to say whether he represented her at all and if so, in what capacity; this occurred after he had participated in the trial, ostensibly in the role of her attorney (Appellee's Appendix, p. 13A). His failure even on appeal to take an unequivocal stand on this point is indicated by his filing a notice of appeal, and furnishing appeal and supersedeas bonds, in the petitioner's name individually, and not as administratrix — an omission which the respondent's attorneys requested that he clarify, which request led to the writing of a letter to the Clerk of the Court of Appeals for the Fourth Circuit asking that language describing the petitioner's representative capacity be added after her name in the documents which had been filed.

The respondent's position on this entire point is simply that the petitioner's attorney, by his various actions and failures to act, has effectively waived this objection. He made no effort to appeal from those portions of Judge Prevet's substitution order which recited that the defendant was administratrix of the estate of the original defendant. He signed a stipulation of fact filed July 18, 1963, concerning the amount of damages to the tractor-trailer owned by the original defendant which indicated petitioner was going to pursue the counterclaim posed by the original defendant. He did not raise until the very day of trial the question of whether her discharge resulted in a lack of capacity to represent the estate of the original defendant. At the trial, when specifically questioned by the trial judge as to whom he represented, he refused to say. (Appellee's Appendix, p. 13A). In appealing the

case, he appealed in the name of the present petitioner as an individual, in spite of the fact that she as an individual was never made a party to the case.

It is respectfully submitted that what the petitioner has done here brings her squarely within the rule enunciated in *Bush v. Remington Rand*, 213 F. 2d 456 (2d Cir. 1954). There, one of the plaintiffs died in 1945. Her estate was settled and distributed in 1947, hearings on the merits before a special master were begun in 1949, and no attempt was made by the defendant to raise the issue of failure to substitute the personal representative of the deceased plaintiff until after the completion of those hearings. On this state of facts, the Court of Appeals for the Second Circuit said, at 213 F. 2d 464:

> "Since the personal representative had not been made a party, dismissal under Rule 25 (a) would ordinarily follow, but he (the District Judge) found that the defendant by its long delay in raising the issue, had waived its right to object and was estopped from invoking the rule. Thus, pursuant to Federal Rule 21, which permits the District Court to add or drop parties at any stage of the proceeding on such terms as are just, he allowed the daughter Isabel D. Bush, Administratrix d.b.n. c.t.a. of the estate of Birney Dysart under Probate Court decree of August 16, 1949, to be added as party plaintiff in the first action.
>
> "We can see no error in this decision. The defendant knew of Mrs. Dysart's death as early as 1946, and if objection had been made at least prior to the hearings in 1949, those proceedings would have been greatly simplified and much time and expense would have been saved. Having stood by while the plaintiffs expended money and effort in bringing the case to judgment, the defendant should no longer be allowed to object. The defendant, in disputing this decision, relies on *Anderson v. Yungkau*, 329 U.S. 482, 67 Sup. Ct. 428, 91 L. Ed. 436 . . ."

"However, we do not think the *Yungkau* case is controlling here where the issue is not the discretion of the Trial Court but waiver by the parties."

The petitioner's attorney long knew that the petitioner had been discharged as administratrix of the original defendant in Florida. The order of discharge, which the petitioner prints at Page 24 of her Appellant's Appendix, was indeed procured by her attorney and furnished by him to the attorneys for the respondent prior to the time when they made their motion to substitute the personal representative of the deceased defendant. Yet the petitioner's attorney waited until the morning of the trial on the merits to make the contention that this discharge resulted in a noncapacity of the petitioner administratrix to represent the original defendant, and made no formal motion covering this point until he moved for involuntary dismissal at the end of the trial on the merits. Under the Rule of *Bush v. Remington Rand*, this appears to be a clear waiver of the right to raise this point.

Pertinent decisions on this issue are, as might well be expected, rare. In addition to the *Bush* case, the respondent's attorneys have been able to find three other cases which indicate that the general law in the United States is that questions with respect to capacity to sue or be sued constitute matters which may be waived. In *Chevers v. Burke's Adm.*, 10 La. 429 (1841), where the defendant filed an answer after a default judgment against her and asserted in the answer that she was not the deceased administratrix it was held error to set the judgment aside, on the ground that she had previously admitted the capacity in which she was sued. In *Wayland v. Porterfield's Exec.*, 58 Ky. 638 (1859), where the defendant had entered a plea of payment in a suit on contract, it was held that this estopped him to controvert the fact that the plaintiff was the executor of the deceased party whom he purported to represent. And in *Ferguson v. Harder*, 141 Misc. 466, 252 N.Y.S. 783 (1931), it was held that the filing of an answer waived objection that a foreign administrator

had no capacity to sue because he had not obtained ancillary letters.

The petitioner originally had the opportunity to dispose of this question by interlocutory appeal, which would have saved the time of all concerned. She elected not to pursue this course, and in preserving her right to appeal from the ultimate decision on the merits, restricted herself to appealing on the grounds that substitution of parties came too late. She then allowed months to elapse before the trial on the merits, without raising the question that she had no capacity to be a defendant in the case, and first raised the point informally at the beginning of the trial, raising the point formally only by general motion for involuntary dismissal at the end of the trial on the merits. It is respectfully submitted that there has been a full and effective waiver of the right to complain in this Court about this aspect of the case. Had the point been raised at any reasonable time prior to trial on the merits the respondent could, under the applicable Florida statutes, have had the petitioner or someone else reappointed as administratrix. The unfairness of making this demand on the very day of the trial on the merits was apparent to the Court of Appeals for the Fourth Circuit.

That petitioner relies heavily upon *Mallonee v. Fahey*, 200 F. 2d 918 (9th Cir. 1952), that only the legal representative of a party may be substituted under Rule 25 (a) (1). However, an examination of the *Mallonee* case reveals it is not in point with this decision. In *Mallonee*, the plaintiff attempted to substitute under Rule 25 (a) (1) the successors in office of the deceased. The Court said that Rule 25 (d) provides for the substitution of successors in office.

The petitioner further raises the question of jurisdiction of the District Court over her person. When this action was tried in the District Court the petitioner, Evva Gertrude King, was present. In *Pulley v. Pulley*, 255 N.C. 423, 121 S.E. 2d 876, (1961), the North Carolina

Supreme Court laid down the following general rules concerning jurisdiction of the person:

> "Jurisdiction of the subject matter cannot be conferred upon a court by, or be based on, the estoppel of a party to deny that it exists. As to other objections to jurisdiction, there may be an estoppel, as in the case of objections to the manner in which, or the steps by which, the court obtained jurisdiction, or to the venue.
>
> "One who invokes or voluntarily submits to the exercise by a court of its jurisdiction upon a matter of which it has power to take cognizance is estopped from subsequently objecting thereto.
>
> "An absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment. However, 'an objection to jurisdiction based on any ground other than lack of jurisdiction of the subject matter, such as lack of jurisdiction of the person or irregularity in the method by which jurisdiction of the particular case was obtained, is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time, or within the time prescribed by statute'."

This action being between a citizen of North Carolina and a citizen of Florida for an amount in excess of $10,000.00, there is no question of the District Court having jurisdiction of the subject matter. The petitioner by her failure to object to her substitution until the day of the trial and by her appearance and participation in the trial of this action clearly waived any irregularities as to jurisdiction of her person.

The Court of Appeals for the Fourth Circuit correctly decided the applicable law in this case. The petitioner filed on July 8, 1964, a Petition for Rehearing concerning the same points raised in the present petition. The Court of Appeals denied the Petition for Rehearing on July 16, 1964.

CONCLUSION

The respondent submits that this petition presents no special and important reasons for a review on writ of *certiorari* and that this petition should be denied.

Respectfully,

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